

The Free State Foundation
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December 5, 2017

Re: WC Docket No. 17-108; Restoring Internet Freedom

EX PARTE WRITTEN SUBMISSION

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

Enclosed you will find for filing in the above-referenced proceeding and attached as Appendix A a *Perspectives from FSF Scholars* that contains ten statements relating to the draft *Restoring Internet Freedom* order by the following members of the Free State Foundation's Board of Academic Advisors: Babette E. Boliek, Timothy J. Brennan, Michelle P. Connolly, Robert W. Crandall, Richard A. Epstein, Justin (Gus) Hurwitz, Daniel A. Lyons, James E. Prieger, Christopher J. Walker, and Christopher S. Yoo. The *Perspectives*, titled "Reactions to the FCC's *Restoring Internet Freedom* Draft Order," was published on December 4, 2017, and is available on the Free State Foundation's website here:

http://freestatefoundation.org/images/Reactions_to_the_FCC_s_Restoring_Internet_Freedom_Draft_Order_120417.pdf

These statements by prominent scholars, all recognized experts in communications law and policy or administrative law, are relevant to various issues before the Commission. Thank you for including this submission in the *Restoring Internet Freedom* record.

Sincerely,

/s/ Randolph J. May

Randolph J. May

President, The Free State Foundation
The Free State Foundation

cc: The Honorable Ajit Pai, Mignon Clyburn, Michael O'Rielly, Jessica Rosenworcel, and
Brendan Carr



Perspectives from FSF Scholars
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Reactions to the FCC's *Restoring Internet Freedom* Draft Order

by

Babette E. Boliek, Timothy J. Brennan, Michelle P. Connolly, Robert W. Crandall, Richard A. Epstein, Justin (Gus) Hurwitz, Daniel A. Lyons, James E. Prieger, Christopher J. Walker, and Christopher S. Yoo *

Below are brief reactions, in 400 words or less, to the FCC's draft *Restoring Internet Freedom Order* from the following members of the Free State Foundation's prestigious Board of Academic Advisors: Babette E. Boliek, Timothy J. Brennan, Michelle P. Connolly, Robert W. Crandall, Richard A. Epstein, Justin (Gus) Hurwitz, Daniel A. Lyons, James E. Prieger, Christopher J. Walker, and Christopher S. Yoo.

BABETTE E. BOLIEK

In a historical move, the new FCC Chairman, Ajit Pai, has released a draft text of the *Restoring Internet Freedom Order* that will soon be voted on by the commission. The order will roll back public-utility style regulation imposed on Internet Service Providers some two years ago. Not only has the rate of ISP infrastructure investment decreased since passage of the 2015 *Open Internet Order*, that order also created at least two grave problems that will be cured by restoring Internet regulation to the light-touch model the United States enjoyed for decades.

The first serious problem created by the 2015 Order was that it stripped the Federal Trade Commission (FTC) of jurisdiction over ISP conduct. One need look no further than the crucially important consideration of consumer privacy to understand how problematic the FTC's removal from the field is. The FTC is the expert agency in privacy protection in all areas of the economy

and has had a great deal of success enforcing privacy protections in an even-handed, consistent manner across every facet of the Internet. Removal of the FTC's jurisdiction created a void. Worse still, the FCC tried to fill the void it had created with an [untested privacy regime](#) that would have conflicted with existing rules, created consumer confusion, and failed to protect the most private of consumer information.

In addition to restoring a well-seasoned privacy cop, returning the FTC to its rightful position will also help protect consumers (and companies) against self-serving, anticompetitive actions by any and all Internet companies. It is difficult to state the import of FTC jurisdiction more [succinctly](#) than did FTC Acting Chairwoman Maureen Ohlhausen: “[Net neutrality] today is an expansive, amorphous concept. It is commonly used to mean protecting consumers and Internet companies from a variety of bad actions by broadband providers. In other words, net neutrality advocates are concerned about protecting consumers and promoting competition. Now, if those two goals sound familiar, it might be because Congress assigned those twin missions to the FTC.”

The second serious problem created the 2015 Order was the FCC's creation of the Internet [General Conduct Rule](#). By the FCC's own edict, the FCC can (i) articulate new, unpermitted business practices, (ii) judge when these previously unarticulated violations of the rule have occurred and (iii) punish violators. The FCC is lawmaker, judge, and executioner – a tri-partite government buried deep in the bowels of the FCC.

TIMOTHY J. BRENNAN

Former FCC Chair Tom Wheeler, under whose authority the FCC issued the likely short-lived 2015 *Open Internet Order* (OIO), had a “mantra”: “competition, competition, competition.” That set net neutrality policy on the path of being viewed as an antitrust problem. The current FCC's draft *Restoring Internet Freedom Order* (RIFO) shows how thin a reed that was, substantively and institutionally.

Substantively, fewer episodes than on the fingers of one hand even suggested a possibly anticompetitive practice by a broadband provider, and even those had potential business or operational justifications. Claims that ISPs had the incentive to deny “net neutral” service neglected Monopoly 101: Even firms with market power lack arbitrary incentives to cut quality, because doing so reduces the price they can charge customers, including “captive customers,” if any.

Institutionally, if “competition, competition, competition” is the concern, the obvious response is to turn to the agencies charged with protecting competition, the Department of Justice's Antitrust Division and the Federal Trade Commission. The draft RIFO proposes to leave net neutrality to FTC enforcement – with the bonus that the FTC can police ISP failure to deliver on net neutrality promises to their subscribers and, with Title II gone, resume its role as regulator of privacy-related practices.

Some question the FTC's effectiveness because it can act only after a practice has occurred. Nothing stops the FTC from providing guidance as to what practices are likely to lead to enforcement actions. A couple of good precedents can do a lot as well.

Theory was also not on the side of the 2015 OIO. The “virtuous cycle,” that zero price access to content suppliers will stimulate broadband and investment, could just as easily turn in the other direction, where charges to content providers give ISPs a stronger incentive to attract and retain subscribers by cutting their prices. Econometricians can address which direction is right; the important point is that the issue is empirical, not theoretical.

Net neutrality advocacy all along has failed to distinguish possibly better arguments from these bad ones. The previous FCC should never have gone down the 2015 OIO path. Simply, and with modesty, it should have proposed that, because of the general importance of the Internet as a communications medium, it would codify established industry practices regarding delivery of standard quality content, and leave the rest to the market – including paid prioritization to foster innovations requiring higher quality service.

MICHELLE P. CONNOLLY

The Net Neutrality debate could serve as a case study in the blind propagation of falsehoods and misrepresentations of a market. I have strong opinions on this issue, but here I want to focus on some facts that have been deliberately distorted or even falsified in current debate:

1. Comcast did not slowdown Netflix as suggested in John Oliver’s funny, but inaccurate sketch that provided the smoking gun that convinced tens of thousands to contact the FCC in support of imposing rules that they had never heard of – nor knew they needed – before. It was later admitted that the slowdown occurred at the level of a content delivery network (CDN) which had slowed the transfer of Netflix content to Comcast.

2. The current FCC intends to reverse an order *imposed in 2015*. I do not see how anyone can argue that the Internet, content, and services on the Internet, and freedom of speech were not flourishing before 2015.

3. “Net Neutrality” is one of the most brilliant marketing campaigns ever created. The 2015 application of the concept of net neutrality is *not neutral*. It favors some Content Service Providers (CSPs), at a cost to other CSPs, to Internet Service Providers, and to consumers who consequently face higher average costs and/or lower average quality of service. It is not about freedom of speech. It is a regulatory grab by the FCC to declare that an “orange” is in fact an “apple,” because the Telecommunications Act gives the FCC the authority to regulate “apples” but not “oranges.” Michael Katz correctly suggests that blocking priority lanes in the name of free speech is analogous to saying that television stations must give advertising airtime for free so that speech is not censored. Congestion issues are present within broadband provision. Disallowing prioritization implies that CSPs whose service requires guaranteed delivery speeds are effectively limited in their ability to even enter the market.

4. However one might feel about the concept of net neutrality, the Internet Conduct Standard that was tacked onto the 2015 Order *has nothing to do with net neutrality*. The FCC simply gave itself carte blanche to intervene in any Internet related issue at any time. Removing this blank check from the FCC tool chest is a service to consumers and an industry that will no longer have the continual risk of FCC meddling in any aspect of the Internet it is in the mood to at the time.

ROBERT W. CRANDALL

Supporters of the FCC's decision to repeal Title II ("public utility") regulation of broadband carriers applaud the decision in large part because they believe that such regulation suppresses capital investment. Recent studies show a substantial slowdown in capital expenditures by broadband carriers since 2014 when the FCC began considering some form of public-utility regulation of broadband. But why should such regulation necessarily reduce carrier investment?

Fifty-five years ago, two economists demonstrated that public utility regulation could actually lead to excessive investment in capital if regulators allowed regulated firms to earn a return in excess of their cost of capital. This conclusion might have applied to the overall regulation of AT&T until the 1960s, but once competition erupted telecom regulation became hostage to a political battle between entrants and incumbents in the setting of *individual* rates, not the overall *level* of rates.

The first example was the FCC's response to AT&T's slashing of private-line long distance rates in 1961 in response to competition from new carriers. For more than two decades, the FCC repeatedly rejected AT&T's rate proposals because it could not sort out the costs of any individual service, such as private lines. Telecom carriers have enormous amounts of joint and fixed costs. How does one determine the share of costs of ducts, pole lines, central-office buildings, etc., that should be allocated to just one of scores or hundreds of services that require the use of these facilities? Any allocation of these costs is at best arbitrary.

After AT&T was broken up, regulators all but abandoned any pretense of setting individual rates based on carrier costs. The best example of this shift was the regulation of rates for entrants' unbundled network access to established local carrier networks. These rates were supposed to be set by state regulators on the basis of "forward looking" costs, which no one could measure. Instead, these rates varied enormously across states depending upon the relative lobbying strength of entrants and incumbent carriers and were repeatedly lowered to attract uneconomic entry into local markets, thereby punishing incumbents and reducing their incentive to invest.

Clearly, the major broadband carriers feared a repeat of this political exercise in a new guise when the FCC decided to subject them to Title II regulation. Reversing course will surely alleviate this concern and unleash carrier investment once again.

RICHARD A. EPSTEIN

FCC Chairman Ajit Pai issue a draft order, "[Restoring Internet Freedom](#)," to bring to an end the Obama era rules on net neutrality. His proposal scraps public utility-type regulation but keeps in place antitrust and consumer protection rules. The former step cuts back on higher compliance costs but leaves open *ex post* controls against both anticompetitive activities and fraud and unfair consumer practices. The hope is to reverse the decline in broadband investment.

Much of this appears to be lost on Professor Tim Wu, who [writes](#) of the impending disaster that he is certain the removal of net neutrality regulations will create by opening up the way to what he regards as serious anticompetitive practices. But at no point in his short account does he

address the interface between cutting back with direct regulation and preserving antitrust remedies. Instead, he makes reference to the occasional risk of “blocking,” a more extreme practice than “throttling” and “paid-prioritization,” as if it were a large source of genuine anticompetitive abuse. But, in fact, that issue is discussed fully in the FCC draft order, which found blocking to be quite “rare,” while still subject to the general antitrust proviso should the facts in question justify its application.

Wu also writes as if the entire system will be regarded as a form of massive FCC overreach in its effort “to abruptly reverse longstanding rules,” without sufficient reason. But the FCC order runs 186 pages with a set of appendices. It seems wildly impossible that any final rule that comes out of this order could be regarded as “arbitrary and capricious,” in light of the enormous care with which it tracks down every facet of the net neutrality debate. The real tragedy in this case was the willful decision of the former FCC Commissioner, Tom Wheeler, who turned around prior rules on net neutrality without any clear direction that spurred the currently observed declines in investment. All network industries are difficult to organize and regulate. The Wheeler rules underestimated the complexity of the broadband market that the Pai order fully acknowledges, Professor Wu’s overwrought critique notwithstanding.

JUSTIN (GUS) HURWITZ

On December 14, the FCC will vote to adopt the *Restoring Internet Freedom Order*. This Order will largely rescind the 2015 *Open Internet Order*, restoring the FCC’s longstanding classification of Internet access as an information service and revoking the 2015 Order’s various cumbersome and uncertainty-inducing rules. In their place the FCC will impose transparency obligations on ISPs that will facilitate competition and consumer choice and enable antitrust and consumer protection authorities other than the FCC to ensure that ISPs do not engage in consumer-harming conduct, and do so while maintaining ISPs’ ability to develop innovative new consumer-friendly services.

This will not be the end of the net neutrality saga. It is a foregone conclusion that proponents of net neutrality regulations will challenge the new Order in court. This challenge will be familiar: those challenging the *new* Order will be making many of the same arguments made by those who challenged the previous Order. They’ll argue that the new Order is arbitrary and capricious, failing to adequately address important factual considerations; they’ll argue that the Commission’s change in policy is problematic; they’ll argue that classifying Internet access as an Information Service is not permissible under the familiar *Chevron* doctrine; and to make that argument they’ll try to distinguish the contemporary setting from that at issue in the Supreme Court’s *Brand X* decision.

I am sympathetic to these arguments. They are, after all, the same arguments that I advanced for why the courts should have overturned the Commission’s 2015 Order. In a sense, I want those challenging the new Order to succeed – that would help rein in the too-powerful executive agencies that have taken over the administrative state.

The new Order, however, is better – factually better, legally better, and better reasoned – than the previous one. It is sufficient on its own terms to survive judicial review – and it is more sufficient than the previous Order to survive review on the terms the D.C. Circuit applied to that

Order. This creates a curious procedural puzzle: the two Orders should rise or fall together. Should the D.C. Circuit Court of Appeals strike down the new Order, it will be on terms that necessarily undermine the previous Order. Importantly, because petitions for review of the prior Order are still pending it may still be possible for the two Orders to be considered together.

One way or another, the Obama/Wheeler-era net neutrality rules are dead and their resurrection is unlikely. Good riddance to bad rules.

DANIEL A. LYONS

One welcome effect of the *Restoring Internet Freedom Order* is its positive impact on innovation in both edge and broadband markets. Net neutrality proponents argue that the paid prioritization ban is necessary to protect innovation among edge providers. But even the 2015 *Open Internet Order* recognized that prioritization can benefit consumers. Some Internet applications are more susceptible to congestion than others. Prioritizing congestion-sensitive traffic can improve the user experience for consumers of those services, without detrimentally affecting the consumers of services that are less sensitive. By permitting paid prioritization, the Commission is allowing app developers to use the price mechanism to signal susceptibility to congestion and the need for prioritization – thus allocating bandwidth the same way we allocate any other scarce resource in society.

Moreover, the 2015 order sought to protect edge innovation by sacrificing innovation in another part of the Internet ecosystem, namely broadband. By lifting common carrier restrictions, the Commission is allowing broadband providers to test new and different business models, which makes it easier for competitive alternatives to emerge. While there remains the potential for anticompetitive abuse, antitrust law continues to provide a sufficient backstop to prevent broadband providers from exploiting market power in ways that harm consumers, while unshackling them to test new models that could benefit consumers.

I also applaud the Commission's focus on transparency. For competition to work, consumers must make informed choices between providers, which means understanding what each provider offers. Through this order, the FCC can improve the quality of broadband markets by assuring consumers get the information they need to make an informed choice among providers.

JAMES E. PRIEGER

The draft order *Restoring Internet Freedom* corrects a serious omission in the current rules. The FCC's 2015 *Open Internet Order* betrayed a blind spot that affected many of the Commission's activities during the previous administration: detrimental impacts of regulation on innovation and investment by some parts of the broadband industry – ISPs, in this case – were dismissed or ignored in favor of supposed benefits accruing to other parts of the broadband ecosystem. I am pleased to see that the draft order contains a discussion in section III.C on investment by *all* parts of the industry, including ISP and players at the edge of the network. The draft concludes “that reclassification of broadband Internet access service from Title II to Title I is likely to increase ISP investment and output.”

It is also heartening to see the inclusion of cost-benefit analysis in the draft order's discussion. Simply put, regulating without considering whether actual costs outweigh actual (and purported) benefits of new rules is a highly irresponsible approach to managing the broadband economy, regardless of whether such analysis is required by law.

I have previously written that stricter regulation of ISPs harms investment, innovation, and the economy, contrary to the claims of net neutrality boosters. Much evidence suggests that strict net neutrality regulation will harm the Internet ecosystem by hampering innovation. The draft order cites some of the research demonstrating this, but actually is quite modest in this regard. For every study cited, the drafters could have included at least three more. Regardless, given what economists already knew about how regulatory burdens are associated with less innovation and investment, it was no surprise to us that – as the draft order notes – broadband investment has fallen in the U.S. since the *Open Internet Order* was adopted, during a period in which investment elsewhere in the economy was rising.

Those who foresee dire consequences for the future of the American Internet from rolling back the 2015 Title II regulation ignore the great success and continued growth of the Internet over the past two decades – growth that occurred (until 2015) in the absence of net neutrality regulation. I look forward to the lighter-touch regulation of ISPs to, as the draft order states, “advance our critical work to promote broadband deployment in rural America and infrastructure investment throughout the nation, brighten the future of innovation both within networks and at their edge, and move closer to the goal of eliminating the digital divide.”

CHRISTOPHER J. WALKER

Last week Chairman Ajit Pai announced his intention to roll back the FCC's 2015 *Open Internet Order*. I leave it to experts in the telecommunications field to debate the legal and policy merits of the proposed order. As a scholar of administrative law, however, I applaud Chairman Pai's decision to make public the draft text of the *Restoring Internet Freedom Order* in advance of the FCC's consideration at its next public meeting.

It is of vital importance to the administrative process that federal agencies provide advance publication of the text of proposed orders and other regulatory actions that they will consider at an agency meeting subject to the Sunshine Act. Unfortunately, at the FCC such transparency has been the exception, not the rule. The public generally has not received the text of proposed orders in advance. Instead, the public has had to divine the final text from the Commissioners' prepared speeches and their interactions at the so-called Sunshine meeting. That is not the way to run a lawmaking system, much less a regulatory process that already suffers from democratic deficits.

Mine is not a minority view. For instance, the Administrative Conference of the United States has similarly criticized such lack of transparency. The Conference, on which I serve as a public member, is a public-private partnership that commissions research and makes recommendations to improve the federal administrative state. In 2014, the Conference, based on an extensive study of agency practices for holding Sunshine meetings, recommended that, “[e]xcept for documents that may be exempt from disclosure under the Freedom of Information Act, agencies should... post in advance all documents to be considered during the [Sunshine] meeting.”

Chairman Pai's decision to embrace this best practice with respect to the *Restoring Internet Freedom Order* is a vital one. I applaud Chairman Pai's decision earlier this year to make this practice the norm, as it increases transparency in the administrative process. In so doing, the agency better promotes the rule of law and increases the public's confidence in the integrity of the agency's decisionmaking process.

CHRISTOPHER S. YOO

The Federal Communications Commission is poised to adopt the proposed order on *Restoring Internet Freedom*. The network neutrality debate has always struck me as having a backward-looking quality, calling for preservation of certain features that are claimed to have been critical to the Internet's past success. As the FCC's proposed order discusses at length, the record before the agency tells a different story. The existing rules have deterred investment and innovation and worsened the digital divide by making service in rural and low-income areas and service by small ISPs more costly.

But regardless of how the inevitable disputes over the past are resolved, past performance predicts future results only if all else is equal. That is emphatically not the case with respect to the Internet. Providers are experimenting with innovative business practices, like T-Mobile's BingeOn, that allow consumers to stream video without having that traffic count against their data caps. The post-smart phone emergence of mobile as the leading platform for broadband connectivity has undercut suggestions that the only solution is to add more capacity. New technologies are emerging, such as 5G and the Internet of Things (IoT), as are new business practices, such as network virtualization, which promise to bring to the infrastructure layer the sharing benefits that have made the Internet so valuable.

These innovations require more flexible approaches that cannot be properly crafted simply by looking at the past. From the time it first emerged, the U.S. was the only country in the world not to fold the Internet into the antiquated regulatory regime created to govern the old telephone network. We have enjoyed the benefits of that decision, creating services and productivity that are the envy of the rest of the world. The key to this success has been the flexible, light-touch regulatory regime that has promoted innovation by making the default answer to any new practice "yes" instead of "no." The 2015 imposition of telephone-style regulation broke from this tradition and instead erected rigid, *ex ante* rules that require innovators to obtain legal opinions and seek permission before they can act.

Returning to the light-touch policy that has served the Internet so well represents the best way to foster innovation in a changing environment. If not, the U.S. risks remaining stuck on the innovation-stifling path that has served other countries so poorly.

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The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.